

**IN THE JUSTICE OF THE PEACE COURT NO. 16  
OF THE STATE OF DELAWARE IN AND  
FOR KENT COUNTY**

M. Dana Lasocha,

Plaintiff,

v.

Mark Weir,

Defendant.

**CIVIL ACTION NO. JP16-08-003647**

Submitted: August 19, 2008  
Decided: September 2, 2008

***TRIAL DE NOVO***

Plaintiff, M. Dana Lasocha, appeared represented by Linda Wilson, Esquire.

Defendant, Mark Weir, failed to appear.

**ORDER**

Arndt, Magistrate  
Murray, Magistrate  
Pennella, Magistrate

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JUSTICE OF THE PEACE  
CHIEF MAGISTRATE

On August 19, 2008, this Court, comprised of the Honorable Ernst M. Arndt, the Honorable James. A. Murray and the Honorable Agnes E. Pennella, acting as a special court, pursuant to 25 Del. C. § 5717(a)<sup>1</sup> held a trial *de novo* in reference to a Landlord/Tenant Summary Petition filed by M. Dana Lasocha (hereinafter referred to as "Plaintiff"), against Mark Weir (hereinafter referred to as "Defendant").

### **History of Plaintiff's Petition**

Plaintiff filed a Landlord/Tenant Summary Petition<sup>2</sup> with Justice of the Peace Court No.16 seeking rent arrears, accruing rent, post-judgment interest, \$40.00 court cost and possession. The following documents were attached<sup>3</sup> as part of the Plaintiff's petition; "Rental Agreement",<sup>4</sup> and "Notice to Pay Rent or Quit".<sup>5</sup> Defendant was served notice<sup>6</sup> of said petition on July 17, 2008. Trial was scheduled on July 30, 2008, on that date the Court held a pre-trial conference and dismissed the Plaintiff's petition. The Court [original trial court] issued its written Order on August 4, 2008.<sup>7</sup> On August 7, 2008, the

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<sup>1</sup> 25 Del. C. § 5717(a). *Nonjury trials*. With regard to nonjury trials, a party aggrieved by the judgment rendered in such proceeding may request in writing, within 5 days after judgment, a trial *de novo* before a special court comprised of 3 justices of the peace other than the justice of the peace who presided at the trial, as appointed by the chief magistrate or a designee, which shall render final judgment, by majority vote...

<sup>2</sup> Time Stamped, RECEIVED 2008 JUN 17 AM 11 20 JUSTICES OF THE PEACE COURT NO. 16.

<sup>3</sup> 25 Del. C. § 5707(4). **Contents of complaint generally.** State the facts upon which the proceedings is based and attach a copy of any written notice of the basis of the claim as an exhibit to the complaint: and

<sup>4</sup> Rental Agreement executed on November 26, 2007.

<sup>5</sup> Five (5) day notice to pay past due rent and late fees. Notice dated June 6, 2008.

<sup>6</sup> Notice was posted at the rental unit by Court Constable.

<sup>7</sup> *Lasocha v. Weir*, Del. J.P., C.A. No. JP16-08-003647, Foor, J. (August 4, 2008) (Dismissal Order).

Plaintiff filed an appeal of the Court's Order pursuant to 25 Del. C. § 5717(a). Trial *de novo* was scheduled for August 19, 2008.

**Application For Entry Of Default Judgment**

After proper notice the Defendant failed to appear for today's trial. The Plaintiff requests this Court enter a default judgment<sup>8</sup> in her favor and against the Defendant.

The Plaintiff's attorney presented testimony through the Plaintiff to establish the statutory requirements needed in order for this Court to grant the Plaintiff's request for default judgment to be entered. Plaintiff's testimony was: She and the Defendant entered into a rental agreement on November 26, 2007. The term of the rental agreement<sup>9</sup> was for one year commencing November 26, 2007 and ending on November 25, 2008. Rent was payable per month in the sum of \$500.00 with a late charge fee of \$20.00. Defendant paid \$360.00 for the month of May (2008) and failed to pay the remaining balance of \$140.00. Defendant failed to pay rent for the months of June, July and August and all late fees. Plaintiff is requesting possession and court cost in the amount of \$90.00. Plaintiff stated she personally served the five (5) day notice<sup>10</sup> at the address of the Defendant. She served this notice to a woman (signature C. Waite on document). Plaintiff testified, "I did not

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<sup>8</sup> 25 Del. C. § 5712(a). **Default Judgment.** No judgment for the plaintiff shall be entered unless the court is satisfied, upon competent proof, that the defendant has received actual notice of the proceeding or, having abandoned the rental unit, cannot be found within the jurisdiction of the court after exercise of reasonable diligence... *See also* 10 Del. C. § 9537(a). **Failure of defendant to appear: adjournment or judgment by default.** After verification of the return of service, if a defendant, being duly summoned in an action under this subchapter, fails to appear by written motion or pleading at or before the date provided for in the summons, or at any time to which the cause is regularly adjourned, judgment by default may be entered... The Court may conduct such hearings as it deems necessary and proper.

<sup>9</sup> Rental agreement entered as Plaintiff's exhibit #1.

<sup>10</sup> Notice to Pay Rent or Quit entered as Plaintiff's exhibit #2.

know she lived there.” Plaintiff then stated that she mailed the Defendant a second five (5) day notice<sup>11</sup> on August 8, 2008, by certified mail.<sup>12</sup> Plaintiff further testified that the Defendant was arrested at some point while residing at the rental unit.

### **Analysis of Review & Discussion**

In order for this Court to enter a default judgment in a Landlord/Tenant Summary Possession Petition the Court must be satisfied that the Plaintiff has met the following requirements:

- (1) Establish that there is a landlord/tenant relationship between the plaintiff and defendant(s).
- (2) Plaintiff’s petition complies with 25 *Del. C.* § 5707.
- (3) Defendant(s) is properly served with notice of plaintiff’s petition.
- (4) Plaintiff’s five (5) day notice complies with 25 *Del. C.* § 5502.
- (5) Plaintiff’s five (5) day notice is properly served upon the tenant(s)/defendant(s).
- (6) Plaintiff filed their petition after the time period of the five (5) day notice has elapsed to cure the non-payment of rent.

The Plaintiff’s petition<sup>13</sup> fails to list any address under the section which is marked “Rental Unit Address”. Title 25 § 5707(1)<sup>14</sup> requires the Plaintiff to state the interest in the rental unit sought and § 5707(3) requires the Plaintiff to: “Describe the

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<sup>11</sup> DEMAND FOR PAYMENT OF RENT entered as Plaintiff’s exhibit #3.

<sup>12</sup> Green Card signed by Defendant on August 11, 2008, entered as Plaintiff’s exhibit #4.

<sup>13</sup> Justice of the Peace Court Civil Form No. 1 (Rev. 2/6/04).

<sup>14</sup> § 5707(1). The complaint shall: State the interest of the plaintiff in the rental unit from which removal is sought.

rental unit from which removal is sought". The Plaintiff has failed to comply with both §§5707(1) & 5707(3). Further Plaintiff's petition under #1 Concise Statement of Facts: (Who, What, When, Where, How?) states; "Not paid rent for May \$140 & for June has not paid any thing (\$500)". Clearly the "Who" is unanswered in the Plaintiff's statement. The Plaintiff's statement is vague at best and fails fully inform the Defendant of exactly what the Plaintiff is seeking. With such a vague concise statement of facts the Defendant cannot prepare an answer nor a defense to the petition.

The Defendant was properly noticed of this petition on July 17, 2008, Court Constable posted said notice pursuant to 25 *Del. C.* § 5706(c)(1).<sup>15</sup>

When a tenant(s) is in default of rent a landlord may demand a tenant(s) to bring said rent current upon demand.<sup>16</sup> The landlord's remedies for a tenant's failure to pay rent are outlined in 25 *Del. C.* § 5502. The landlord's demand for past due rent must be in written form to the tenant(s) and said notice must contain the following:

- (1) Notice must include the date in which said notice was written.
- (2) Notice must state the specific amount of rent due. (This amount must be itemized so that the tenant may understand how the landlord determined to amount of rent being demanded).
- (3) Notice must identify the rental unit by address for which rent is being demanded.
- (4) Tenant(s) must be given a time period<sup>17</sup> in which to cure non-payment of rent. This time period **shall not** be less than five (5) days.<sup>18</sup>

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<sup>15</sup> Upon a natural person by affixing a copy of the notice and complaint upon conspicuous part of the rental unit within 1 day thereafter, ...

<sup>16</sup> Such demand notice is referred to as "the five (5) day letter or notice" because the least amount time that a landlord may give a tenant to cure the non-payment of rent is five (5) days.

<sup>17</sup> 25 *Del. C.* § 5502(a). ... demand payment thereof and notify the tenant in writing that unless payment is made within a time mentioned in such notice, to be not less than 5 days after the notice was given or sent...

- (5) Notice must be addressed and mailed separately to every tenant on the lease agreement. (When there are multiple tenants on a rental agreement, the landlord may compose 1 demand notice which includes the name of every tenant on said rental agreement but a copy of said demand notice *shall* be mailed to each tenant if the landlord chooses to obtain service via mail).
- (6) Notice must state should the tenant(s) fail to pay the outstanding balance within the time frame mentioned the lease agreement shall be *terminated*.
- (7) Notice must state should the tenant(s) fail to pay the outstanding balance within the time frame mentioned the landlord may bring an action for summary possession in court.<sup>19</sup>

Whereas the five (5) day notice is based on non-payment of rent and “rent” is therein referred to throughout the five (5) day notice, the Court must determine what is rent. Rent is defined as a consideration paid for the use or occupation of property. In a broader sense, it is the compensation or fee paid, usually periodically, for the use of any rental property, land, buildings, equipment, ect.<sup>20</sup> Rent may also include late charges<sup>21</sup> when provided by the rental agreement. Said late charges shall not be imposed if the rent

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<sup>18</sup> 25 Del. C. § 5112. **Time computation.** In computing any period of time prescribed or allowed by order of the Court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run *shall not be included* [emphasis added] unless specifically included by statute, order or rule....When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays *shall be excluded* [emphasis added] from the computation.

<sup>19</sup> More appropriately notice should state, “may bring an action for summary possession in the Justice of the Peace Court”, however, notice is acceptable if it states; may bring an action in court or court action or summary possession action in court.

<sup>20</sup> Black’s Law Dictionary, 6<sup>th</sup> Edition, West Publishing (1990).

<sup>21</sup> 25 Del. C. § 5501(d). Tenant obligations; rent. ...such late charge shall not exceed 5 percent of the monthly rent. A late charge is considered as additional rent for the purposes of this code.

is paid in full within five (5) days after the date rent is due. Additionally, rent may include charges for utility services pursuant to 25 Del. C. § 5312(e).<sup>22</sup>

Any other charge(s)<sup>23</sup> included in the five (5) day notice which is not enumerated above is not considered rent. Any monetary claim contained in the five (5) day notice which *is not rent* artificially inflates the balance of said notice and renders the five (5) day notice defective thereby barring the landlord from receiving judgment.<sup>24</sup>

The Plaintiff's five (5) day notice, while not as clearly stated as the Court would prefer, does comply with the requirements of 25 Del. C. § 5502 less the Proof of Service section of the document. As to the Plaintiff's second five (5) day notice,<sup>25</sup> the Court shall consider it moot and take no action as to its validity or as its service. A second five (5) day notice is unable to correct any defects that may be contained in the first five (5) day notice without filing a new petition with the court based on this newer notice.

In addition to the above stated requirements for a five (5) day notice, the notice must be served upon the tenant(s) as required by 10 Del. C. § 9524, 25 Del. C. § 5113, Court Rule<sup>26</sup> and consistent with case law.<sup>27</sup> In essences, in a Landlord/Tenant Summary

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<sup>22</sup> § 5312(e). Charges for utility services made by a landlord to a tenant shall be considered rent for all purposes under this Code. With respect to security deposits, and unless the rental agreement otherwise provides, the rights and obligations of the parties as to payment and nonpayment of utility charges shall be enforced in the same manner as the rights and obligations of the parties relating to payment and nonpayment of rent...

<sup>23</sup> Examples: charges for postal mailing, nonpayment of security deposit, envelopes for mailing, ect...

<sup>24</sup> *Wilmington Trust v. Conner*, 415 A.2d at 776 (deficiency judgment denied when inflated balance in notice was \$654.61 above amount actually owed and there was no reference to possible finance charge or insurance premium rebates in notice). See also Legal Memorandum No. 83-110 (4<sup>th</sup> Supplement), Del. J. P., Griffin, C.M. (June 6, 2000).

<sup>25</sup> Plaintiff's exhibit #3.

<sup>26</sup> Justice of the Peace Court Civil Rule 5. Service and filing of pleadings and other papers.



Possession Petition the five (5) day notice is serving much of the same purpose as a summons. A summons is an instrument used to commence a civil action or special proceeding and is a means of acquiring jurisdiction over a party.<sup>28</sup> Notice in its legal sense is information concerning a fact, actually communicated to a person by an authorized person, or actually derived by him from a proper source, and is regarded in law as "actual" when the person sought to be affected by it knows thereby of the existence of the particular fact in question. (*See also* United States v. Tuteur, C.A.Ill., 215 F.2d 415).<sup>29</sup> A five (5) day notice pursuant to 25 Del. C. § 5502(a) must be served upon the tenant(s) before the landlord can *commence an action* before the court, therefore the five (5) day notice must be served in the same manner as consistent with that of a summons, each tenant listed on the lease agreement must receive a five (5) day notice in order to invoke the personal jurisdiction of the Court. A five (5) day notice which is addressed to each tenant but mailed in one envelope is not considered as service or "served" on all tenants. Such practices are addressed in *Eanes v. Custer*, Del. Super., C.A. No. 94C-05-019, Terry, J. (August 31, 1994). Judge Terry's Order states in pertinent part:

...Jurisdiction over the Defendants was attempted by substituted service pursuant 10 Del. C. § 9524 where a procedure is established for service of summons. One of the methods of service is by "sending a copy of the summons with accompanying papers, if any, to him by certified mail...". Looking at the statute as a whole it is obvious that it requires a copy of the

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<sup>27</sup> *Eanes v. Custer*, Del. Super., C.A. No. 94C-05-019, Terry, J. (August 31, 1994). *See also* Key Box "5" Operatives, Inc. v. Valentine, Del. J.P., C.A. No. JP17-95-02-0224, Brittingham, J., Comly, J. and Davis, J. (May 10, 1996).

<sup>28</sup> Black's Law Dictionary, 6<sup>th</sup> Edition, West Publishing Co. (1990).

<sup>29</sup> *Id.* at 1061



summons to be sent to each Defendant. In the case at bar, only one summons was sent in an envelope addressed to three people. The failure to send a separate summons for each Defendant violates the clear intent of Section 9524...

...If a summons is mailed to an individual at his address and someone residing there accepts it, one can fairly presume that the individual to whom it is addressed will receive it. Similarly if three summonses are mailed in three separate envelopes to three individuals residing in the same house and one person receives all three, it can still be fairly presumed that they will be delivered by that individual to the persons to whom they are addressed. However, if one summons is mailed in only one envelope addressed to three people and is received by one person, the chances that the one summons will be passed around to all three addressees is considerably more remote. For instance, the first addressee, if he gets it, might lose it or throw it away not realizing or caring that it should be shown to the others...

The material aspects of 10 *Del. C.* § 9524 and 25 *Del. C.* § 5113 are the same and therefore if substitute service is attempted a notice must be sent to each tenant. *Key Box "5" Operatives, Inc. v. Valentine*, Del. J.P., C. A. No. JP17-95-02-0224, Brittingham, J., Comly, J. and Davis, J. (May 10, 1996).

The remaining question before the Court regarding service is what constitutes personal service. Title 25 section 5113(a) permits personal service of notices and pleadings. This section states in pertinent part: "...shall be served either personally upon the tenant or landlord or upon the tenant by leaving a copy thereof at the person's rental unit or usual place of abode with an adult person residing therein;..."

Merely serving an adult at the tenant's residence who is not a resident<sup>30</sup> is not service. In the case at bar, the Plaintiff testified that she served a woman who was at the rental unit but did not know if she lived there. Only the Defendant is listed as a resident

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<sup>30</sup> Black's Law Dictionary, 6<sup>th</sup> Edition, west Publishing Co. (1990) **Resident**. The word "resident" when used as a noun, means a dweller, habitant or occupant; one who resides or dwells in a place for a period of more, or less duration; it signifies one having a residence, or one who reside or abides.

on the rental agreement. Additionally, Plaintiff's exhibit #1, under Proof of Service, has four options to check in accordance with how the notice was served. The notice is checked; "On June 6, 08, I handed the Notice to the tenant." The Plaintiff testified that she gave notice to a woman, the tenant is a man, therefore her evidence and testimony conflict. The second choice on this notice states: I handed the Notice to a person of suitable age and discretion at the tenant's residence/business on \_\_\_\_\_. This option was not checked and left blank. A third option states: I posted the Notice in a conspicuous place at the tenant's residence on \_\_\_\_\_. In this blank there is a name C Waite, not a date as the notice calls for.

The Court cannot ascertain with any certainty as to how the notice was served by the Plaintiff. If the Court chose to give the Plaintiff's testimony more weight than her exhibit #1, the Plaintiff has still failed to provide competent proof to the Court's satisfaction that the woman whom she gave the five (5) day notice was or is a resident at the rental unit. Therefore, the Plaintiff has failed to properly serve the Defendant with notice as required by 25 Del. C. § 5113(a).

#### **Counsel's Argument For Default Judgment**

Counsel proffers to the Court that a default judgment should enter as a result of the Defendant failing to appear. In support of this request, Counsel asserts that the Plaintiff has substantially complied with the statutory requirements necessary to obtain a default judgment and has appeared while the Defendant has failed to appear for said hearing. The Court made inquiry as to whether it is appropriate for the Court to enter a default judgment based on Counsel's representation that the Plaintiff had *substantially*

complied with applicable statutory requirements verses *fully* complying with the applicable statutory requirements. Counsel reasserted that her client should receive justice and be granted a default judgment as her client has *substantially* complied with the necessary requirements for a default judgment to enter and further that the Defendant has appeal rights if he disagrees with the Court's decision.

The Court does agree with Counsel that upon a defendant failing to appear for trial a plaintiff may request the Court to enter a default judgment, however a defendants failure to appear is not the only issue the Court takes into consideration when determining if entry of default judgment is proper. The Court must first be satisfied that the defendant was properly noticed<sup>31</sup> for said trial. In this case the Court is satisfied that the Defendant was properly noticed to appear for trial. Thereafter, the Court must be satisfied that a plaintiff's petition has complied fully with all the applicable statutory requirements. Pursuant to 10 *Del. C. § 9537(a)* and 25 *Del. C. § 5712(a)*, the Court may conduct a hearing to obtain competent proof that a plaintiff has, in fact, complied *fully* with all the applicable statutory requirements in the filing of their petition, which in a Landlord/Tenant Summary Possession Petition would include; proof that a landlord/tenant relationship exist between the plaintiff and defendant, plaintiff's petition complies with 25 *Del. C. § 5707*, proof of service of said petition, proper five (5) day notice to cure pursuant to 25 *Del. C. § 5502*, proof of proper service of the five (5) day notice and the petition was filed after the time to cure had elapsed.

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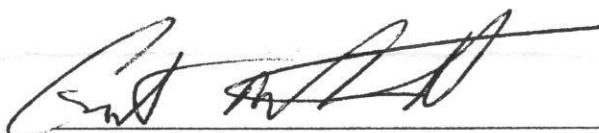
<sup>31</sup> 25 *Del. C. § 5712(a)*. No judgment for the plaintiff shall be entered unless the court is satisfied, upon competent proof, that the defendant has received actual notice of the proceeding...

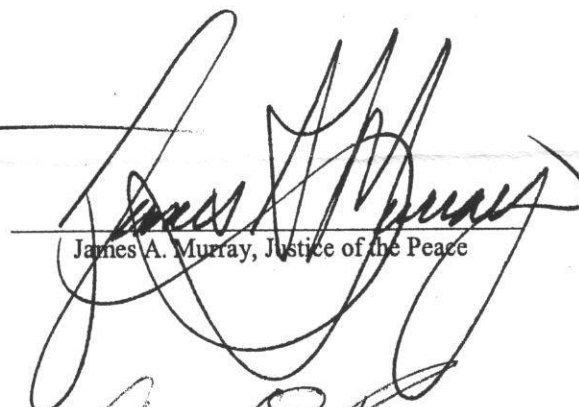
Counsel's assertion that the Court should enter a default judgment as a result of the Defendant's failure to appear and the Plaintiff's *substantial* compliance with the statutory requirements is incorrect. The consequence of a defendant's failure to appear may be the entry of a default judgment, if the plaintiff has complied *fully* with the applicable statutory requirements. The statutory requirements are not diminished as a result of the defendant's failure to appear nor are these requirements diminished by the fact that a defendant has a right to appeal.

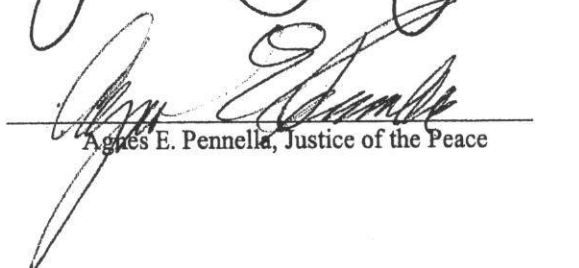
**Conclusion**

Based on the Court's fact finding inquiry and the Court's above-referenced conclusions of law, the Plaintiff has failed to prevail as to her appeal. The Plaintiff's request for a default judgment to enter is hereby ***Denied***.

**IT IS SO ORDERED this 2<sup>nd</sup> day of September, 2008.**

  
Ernst M Arndt, Justice of the Peace

  
James A. Murray, Justice of the Peace

  
Agnes E. Pennella, Justice of the Peace